IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
SECOND APPEAL NO.174 OF 1991

1. Dhonddev Rajaram Keluskar
2. Bhaskar Rajaram Keluskar
3. Satyavan Rajaram Keluskar
4. Maruti Rajaram Keluskar

All of Taramumbari, Taluka Deogad,
Dist. Sindhudurg Appellants
(Org. Plaintiffs)

Vs.

1. Parshuram Raghunath Khadapkar
2. Prabhakar Vasant Khadapkar

Both residents of Deogad,
Tal. Deogad, Dist. Sindhudurg. Respondents
(Org. Defendants)

Mr.G.R.Rege with Mrs.Shakuntala A. Mudbidri for appellants.

Respondent Nos.1 and 2 absent, though served.

CORAM: B.H.MARLAPALLE,J.

December 15, 2005.

ORAL JUDGMENT

1. This Second Appeal arises from the appellate decree passed by the learned Additional District Judge at Sawantwadi in Civil Appeal No.5 of 1984 on 19th July 1990 whereby the decree passed by the trial Court in RCS No.18 of 1978 on 30-11-1983 came to be set aside and the said suit was dismissed on the

ground that it was hit by limitations i.e. the suit was filed after a period of 12 years from the date of symbolic possession given to the plaintiff on 13-1-1944. The substantial question of law in this Second Appeal for consideration before this Court is,

> "Whether the lower Appellate Couirt was right in dismissing the suit on the ground of limitations?"

2. The appellants had instituted Regular Civil Suit No.18 of 1978 for partition and separate possession with respect to the agricultural land in Survey No.395, Pot Hissa No.9 of village Jamsande. The present respondents were impleaded as defendants and it was contended that the plaintiffs are the LRs of Rajaram Keluskar who had purchased the 1/4th interest of one Bhikaji Kanu Khadapkar in the undivided share of the said land, in auction sale ordered in Diary Application No.144 of 1943. Rajaram Keluskar had filed the money suit bearing No.123 of 1935 and it was decreed. For the execution of the decree Regular Darkhast No.43 of 1941 was filed. The

said Darkhast was allowed and the 1/4th undivided share of Bhikaji Kanu Khadapkar was directed to be auctioned. The auction was held on 11-9-1942 and in Diary Application No.144 of 1943 the said sale was confirmed on 22-12-1943, whereas the sale certificate was issued on the very next date i.e. 23-12-1943. The symbolical possession of the auctioned suit land was given to Rajaram Keluskar on 26-12-1943 vide Tabepavti at Exh.21. This symbolical possession was confirmed on 13-1-1944, but the joint property i.e. the agricultural land in Survey No.395 was not partitioned amongst the holders i.e. Bhikaji Khadapkar having 1/4th share, Bhalchandra Vishnu Bidaye having 1/2 share and the defendant-Prabhakar Vasant Khadapkar having 1/4 share. It was claimed by the plaintiffs that the defendants had resisted the claim of the plaintiffs on the 1/4th share of the common land in Survey No.395. Both the defendants had filed Written Statement but the original Defendant No.1 did not dispute the quantum of the share of the respective parties. He had contended that Bhalchandra Bidaye who has taken away his 1/2 share in the common land was a necessary party in the suit and he also claimed his 1/4th share whereas defendant no.2 denied that the plaintiffs had

purchased the share of deceased Bhikaji in the auction sale and in any case he was in constructive possession and became the owner of the suit land by adverse possession. As per him the plaintiffs' right to sue was extinguished under Section 27 of the Limitation Act, 1963 and the auction sale was never acted upon. He further went on to state that the deceased Bhikaji had purchased the land in the name of Rajaram as a benamidar and the suit was bad for non-joinder of necessary parties.

3. The plaintiffs had pleaded that the cause of action to file the suit arose on 6th September 1977 on account of the order passed by the Sub Divisional Officer deleting the plaintiffs' name from the Kabjedar column, by holding that the defendant no.2 was in possession. As per the plaintiffs, the defendant no.2 had no title to the 1/4th share of deceased Bhikaji and after the half share in the total land was taken away by Bhalchandra Bidaye, the remaining half was the joint share of defendant no.1 and deceased Bhikaji and pursuant to the auction sale, he was put in symbolical possession of Bhikaji's share. The trial Court held that the plaintiffs' father Rajaram had purchased 1/4th share

of late Bhikaji Khadapkar in the auction sale and he was put in symbolical possession by Tabepavti at Exhibit 21 and the certified copy of mutation entry no.5238. The documents at Exhibits 23 and 24 were the record of rights of the suit land from 1928-29 to 1939-40 and 7/12 extract for the period from 1940-41 to 1952-53. The land was standing in the name of four sharers i.e. Bhikaji, defendant no.1 and Bhalchandra Bidaye. The name of Rajaram came to be entered in the other rights column as was clear from the documents at Exhibits 27 and 28 which were the certified copies of mutation entry nos.7557, 7622 and 14, 144. Exhibit 26 was the certified copy of the mutation entry no.5238 in the name of Rajaram. The 7/12 extracts for the years 1973-74 and 1976-77 at Exhibits 4 and 5 went to show that the plaintiffs were in possession of the suit land in those years. Order XXI Rule 96 of CPC provides for symbolic possession where the property sold is in occupation of a tenant or other persons entitled to occupy the same. There is no dispute that the remaining half share held by defendant no.1 and late Bhikaji was not partitioned till the SDO passed his order on 6-9-1977 in RTS Appeal No.9 of 1977. The trial Court, therefore, held that the delivery of constructive

possession in favour of Rajaram was legal and valid and the plea of defendant no.2 that he had become owner by adverse possession of Bhikaji's 1/4th share was rejected. The defendant no.2 did not step in the witness box nor did he adduce any oral and documentary evidence except the order passed by the SDO in support of his plea of adverse possession. The trial Court, therefore, held that the defendant no.2 failed to discharge the onus of proving that he became owner of the suit land by way of adverse possession. The defendant's plea of the suit having been barred by Section 27 of the Limitation Act, 1963 was rejected by the trial Court so also the claim made by the defendant no.2 that the suit property was purchased by Bhikaji Khadapkar in the name of Rajaram.

4. When the defendants went in appeal by filing Civil Appeal No.5 of 1984 the lower Appellate Court held that the suit was hit by the law of limitation as it was filed beyond a period of 12 years after the symbolical possession in favour of Rajaram in respect of the suit land was confirmed on 13/1/1944. The lower Appellate Court held that Article 138 of the old Limitation Act i.e. Limitation Act, 1908 was

applicable to the suit land as the sale was confirmed on 13/1/1944. The Suit was filed on 19/8/1978 and the period of 12 years from the date of symbolical possession was over on 13/1/1956. Section 27 of the Limitation Act deals with the extinguishment of the right to property and it states that at the determination of the period hereby limited to any person for instituting suit for possession of any property, his right to such property shall be extinguished. The lower Appellate Court, therefore, held that the suit ought to have been dismissed by the trial Court on the point of limitation itself.

. Article 138 of the Limitation Act, 1908 reads as under:

Description of suit	**Period of limitation**	**Time from which period begins to run**
Like a suit by a purchaser at a sale in execution of a decree, when the Judgment debtor was in possession at the date of the sale.	Twelve years.	The date when sale becomes absolute.

As noted earlier the cause of action for filing the suit arose on account of the order passed by the SDO in RTS Appeal No.9 of 1977 for deleting the name of Rajaram from the Kabjedar column and, therefore, for the suit filed in the year 1978, the old Limitation Act of 1908 would not be applicable. Article 144 of the old Limitation Act is covered by Article 65 of the present Act and it states that for possession of the immovable property or interest therein based on title, the suit can be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. The suit land i.e. the half share between the defendant no.1 and deceased Bhikaji was never partitioned and, therefore, the plaintiffs' father Rajaram was not put in physical possession of the 1/4th share which he had purchased in auction from Bhikaji which could not have been crystalised unless there was a partition. If the suit land was partitioned and the respective shares of the joint owners were identified earlier to the date of filing of the suit, the limitation period would run against the plaintiffs from the date of such partition. Such was not the factual position in the instant case and in any case the plea of defendant no.2 regarding ownership by adverse

possession was rejected by the trial Court, he had no legal title to the suit land. It was the specific case of the plaintiffs that by mutation entry no.14, 144 the defendant's name was deleted and subsequently the SDO allowed the defendant's appeal i.e. Appeal No.9 of 1977 on 6-9-1977 and directed to delete the names of the plaintiffs from the Kabjedar column and held that the actual possession of the suit land was with defendant no.2. Thus the cause of action for filing the suit arose for the first time on 6-9-1977 and not on the date of confirmation of symbolical possession i.e. 13/1/1944. Under the circumstances, the view taken by the lower Appellate Court that the suit filed by the plaintiffs was hit by the law of limitation is unsustainable in law. The lower Appellate Court did not consider the appeal filed by the defendants on merits and had allowed it only on the point of limitation. The said appeal will have to be, therefore, decided on merits and by holding that the suit filed was not hit by limitations.

5. In the premises this Second Appeal succeeds and the same is hereby allowed. The judgment and order passed by the lower Appellate Court in Regular Civil Appeal No.5 of 1984 is hereby quashed and set

aside. The said appeal is hereby restored to the file of the lower Appellate Court and it is directed that it shall be heard and decided on merits as expeditiously as possible and in any case within a period of three months from the receipt of writ from this Court.

(B.H.MARLAPALLE,J.)